

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
BRIAN S. MILLER, JUDGE

DIVISION II

CA06-646

April 4, 2007

JAMES PENNY
APPELLANT
v.

AN APPEAL FROM WASHINGTON
COUNTY CIRCUIT COURT
[No. CIV-2004-1828-1]

LIBERTY BANK OF ARKANSAS
and LARRY L. HOSSFELD
APPELLEES

HONORABLE WILLIAM A. STORY,
CIRCUIT JUDGE

AFFIRMED

Appellant James Penny filed a motion in the Washington County Circuit Court to set aside a summary judgment granted to appellee Liberty Bank of Arkansas and a default judgment granted to appellee Larry Hossfeld. The circuit court denied appellant's motion, and he now appeals. We affirm.

In March 2003, appellant, Hossfeld, and Jack Tidey, on behalf of RF Filter Technologies Corporation, entered into a contract with Liberty, in which Liberty agreed to purchase RF's receivables. The contract obligated RF to repurchase the receivables after a stated period of time. Appellant, Hossfeld, and Tidey personally guaranteed RF's obligations to Liberty. On October 12, 2004, Liberty sued RF, appellant, Hossfeld, and

Tidey, jointly and severally, alleging that RF had breached the contract by failing to repurchase \$22,902.86 in receivables. Appellant was served with process on October 27, 2004, at his “regular place of employment at (Filtex Corp) 887 E. Henri De Tonti, Springdale, Washington County, Arkansas.”

Appellant filed a pro se answer with the clerk and listed the following address under his signature: “PO Box 7644, Spde. AR 72766-479-306 4076.” He did not include an address on the copy of his answer that was sent to Liberty.

Liberty moved for summary judgment and mailed a copy of its motion to appellant at the address listed on the answer filed with the clerk. Hossfeld filed a cross-claim for indemnification and breach of contract against appellant and RF and mailed it to appellant at the same address. Tidey filed a cross-claim for indemnification against appellant and RF and mailed the cross-claim to the address that appellant wrote on the answer filed with the clerk. Appellant did not respond to the motion for summary judgment or the cross-claims.

On April 11, 2005, the circuit court entered a default judgment for Hossfeld against appellant and RF in the amount of \$18,555.13, plus attorney’s fees; entered a default judgment for Tidey against appellant and RF in the amount of \$11,451.43, plus attorney’s fees; and granted summary judgment to Liberty against appellant, RF, and Tidey, jointly and severally, in the amount of \$11,451.43, plus attorney’s fees and costs. The court dismissed Liberty’s claim against Hossfeld, stating that the claim had been settled.

On October 4, 2005, appellant filed a pro se “petition for exemption” from seizure of his property, listing his address as “7125A McGuire Rd, Fayetteville, AR 72703, 479-

443-7852 (work).” On January 13, 2006, by retained counsel, appellant, pursuant to Rule 60 of the Arkansas Rules of Civil Procedure, filed a motion to vacate Hossfeld’s default judgment and Liberty’s summary judgment. Appellant alleged that he was personally served with notice of the lawsuit at “887 Henri De Tonti Boulevard, Tontitown, Arkansas, 72770”; that the return and affidavit of service contained a valid mailing address for him; that, for several years, he had maintained the mailing address of “P.O. Box 7033, Fayetteville, Arkansas, 72702”; and that the address used by Hossfeld and Liberty was for a corporation where appellant used to work, which was not his last known mailing address, as required by Ark. R. Civ. P. 5. Appellant alleged that he had answered all pleadings served upon him personally and that he “would have answered this lawsuit fully if he had received proper notice.” No affidavit was filed in support of his motion.

Although we have no record of the hearing on appellant’s motion to vacate the judgments, the circuit court denied appellant’s motion in an order entered on February 27, 2006. Appellant filed a timely notice of appeal.

Appellant first argues that the circuit court erred in denying his motion to set aside the default judgment for Hossfeld and the summary judgment for Liberty, because both appellees failed to mail copies of their pleadings to his last known mailing address. He asserts that appellees mailed copies of their pleadings to him at P.O. Box 7644, Fayetteville, which is the address of a company for which he no longer works. He further states that appellees were aware that he could be served at 887 Henri De Tonti Boulevard in Springdale, because that is the address where he was served with the complaint, as proven

by the return of service in the file. He argues that appellees failed to comply with Ark. R. Civ. P. 5(b)(2), which governs the service of pleadings other than the complaint and summons. *See Arnold & Arnold v. Williams*, 315 Ark. 632, 870 S.W.2d 365 (1994), *cert. denied*, 513 U.S. 990 (1994).

We review trial court decisions made pursuant to Rule 60 for an abuse of discretion. *Joplin v. Joplin*, 88 Ark. App. 190, 196 S.W.3d 496 (2004). We also apply an abuse-of-Discretion standard to the trial court's decision granting a default judgment. *Southeast Foods, Inc. v. Keener*, 335 Ark. 209, 979 S.W.2d 885 (1998).

The circuit court did not err when it denied appellant's motion to set aside the summary judgment and default judgment orders. This is true because Arkansas Rule of Civil Procedure 11(a) requires a party who is not represented by an attorney to state his address and telephone number on his pleadings. Appellant wrote "PO Box 7644, Spde. AR 72766-479-306 4076" on the answer filed with the clerk and appellees had a right to believe that was appellant's address. One may not complain of action that he has induced or to which he has consented or acquiesced. *Anderson v. Anderson*, 60 Ark. App. 221, 963 S.W.2d 604 (1998); *Neel v. Citizens First State Bank*, 28 Ark. App. 116, 771 S.W.2d 303 (1989).

Moreover, there is no evidence showing that appellant did not actually receive the motion for summary judgment and the motion for default judgment. Indeed, no affidavit was filed supporting appellant's statements of fact regarding his last known address and factual allegations in pleadings or briefs will not support summary judgment pleadings. *See*

Laird v. Shelnut, 348 Ark. 632, 74 S.W.3d 206 (2002); *Pyle v. Robertson*, 313 Ark. 692, 858 S.W.2d 662 (1993); *Godwin v. Churchman*, 305 Ark. 520, 810 S.W.2d 34 (1991). It is an appellant's burden to bring up a record sufficient to demonstrate error. *Rose Care, Inc. v. Ross*, 91 Ark. App. 187, 209 S.W.3d 393 (2005). Appellant failed to prove that the address to which appellees mailed their pleadings was not his address.

In his second point, appellant argues that Liberty's motion for summary judgment should be set aside pursuant to Rule 60 of the Arkansas Rules of Civil Procedure, which provides that, after ninety days, a judgment may be set aside under certain enumerated circumstances. In support of this argument, appellant states that he had a valid defense to Liberty's motion for summary judgment because the contract at issue lacked mutuality of obligation. Appellant maintains that the contract was a one-sided agreement that imposed no obligation on Liberty to purchase RF's receivables. At the same time, RF was obligated to turn over its receivables to Liberty and to repurchase any receivables that Liberty could not collect within 120 days from the invoice date.

The essential elements of a contract are: (1) competent parties; (2) subject matter; (3) legal consideration; (4) mutual agreement; and (5) mutual obligations. *Foundation Telecomms., Inc. v. Moe Studio, Inc.*, 341 Ark. 231, 16 S.W.3d 531 (2000). Mutuality of contract, however, becomes a nonissue when one party to the agreement performs its obligation. *Jordan v. Diamond Equip. & Supply Co.*, 362 Ark. 142, 207 S.W.3d 525 (2005). In the present case, Liberty performed by purchasing more than \$22,000 in receivables from RF. Consequently, the question of mutuality of obligation is moot.

Affirmed.

VAUGHT and HEFFLEY, JJ., agree.